No. 85-1551

Supreme Court, U.S.
FILED
MAY 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ALAN J. KARCHER, as Speaker of the New Jersey General Assembly, *et al.*,

Appellants,

v.

JEFFREY MAY, individually, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

---

BRIEF OF *AMICUS CURIAE* NEW JERSEY EDUCATION ASSOCIATION IN SUPPORT OF APPELLEES

JAMES R. ZAZZALI
Counsel of Record

KENNETH I. NOWAK
CHRISTOPHER L. LEAVEY
ZAZZALI, ZAZZALI & KROLL
One Gateway Center
Newark, New Jersey 07102
(201) 623-1822

Attorneys for New Jersey Education Association

Adams Press Corp., 1188 Raymond Boulevard, Newark, New Jersey 07102—(201) 623-8611

30 pp

Parties

Defendants-Appellants in this case are Alan Karcher, who was Speaker of the 200th New Jersey General Assembly, and Carmen Orrechio, who was President of the 200th New Jersey Senate. Plaintiffs-Appellees are students and parents of students in two New Jersey public school districts, and one New Jersey public school teacher, Jeffrey May. The New Jersey Education Association submits this brief as *amicus curiae* in support of the appellees. Hereinafter, defendants-appellants shall be referred to as "appellants"; plaintiffs-appellees shall be "appellees"; and the *amicus curiae* New Jersey Education Association shall be "the NJEA" or "*amicus*".

TABLE OF CONTENTS

	PAGE
Parties	i
Table of Authorities	iii
Interest of *Amicus Curiae*	1
Statement of the Case	3
A. Facts	3
B. Procedural History	4
C. The District Court's Decision	6
D. The Court of Appeals' Decision	7
Summary of Argument	8
ARGUMENT:	
POINT I—The MOS is an unconstitutional abridgement of the Establishment Clause because the purported "secular legislative purpose" is no more than a sham and the true purpose is entirely religious	9
POINT II—The MOS unconstitutionally abridges the Establishment Clause because it has a primary effect of both advancing and inhibiting religion	19
Conclusion	23

PAGE

Table of Authorities

Cases Cited

Abington School District v. *Schemp*, 374 U.S. 203 (1963) 9, 12

Committee For Public Education v. *Nyquist*, 413 U.S. 756 (1973) 19

Engle v. *Vitale*, 370 U.S. 421 (1962) 9

Epperson v. *Arkansas*, 383 U.S. 95 (1968) 11-15, 18-21

Everson v. *Board of Education*, 330 U.S. 1 (1947).... 9

Griggs v. *Duke Power Co.*, 401 U.S. 424 (1970) 14

Lemon v. *Kurtzman*, 403 U.S. 602 (1971) 7, 8, 10-12, 15, 19, 20

Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) 11

Marsh v. *Chambers*, 463 U.S. 783 (1983) 12

McCollum v. *Board of Education*, 33 U.S. 203 (1948) 22

Stone v. *Graham*, 449 U.S. 39 (1980) 11,12

Tilton v. *Richardson*, 403 U.S. 672 (1971) 21

United States v. *O'Brien*, 391 U.S. 367 (1968) 12

Wallace v. *Jaffree*, 472 U.S. 38 (1985) 8, 10-13, 19-21

United States Constitution Cited

First Amendment 4

Establishment of Religion Clause 4

Fourteenth Amendment 4

Due Process Clause 4

PAGE

Statutes Cited

N.J. Stat. Ann. §18A:36-4 (West Supp. 1986) 2, 10

42 U.S.C. §1983 4

42 U.S.C. §2201 4

42 U.S.C. §2202 4

Rule Cited

Federal Rule of Evidence 803 (24) (Best Evidence Rule) 14

Other Authority Cited

Note, *The Unconstitutionality of State Statutes Authorizing Moments of Silence In The Public Schools*, 96 Harv. L. Rev. 1874 (1983) 9, 12

No. 85-1551

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ALAN J. KARCHER, as Speaker of the New Jersey General Assembly, *et al.*,

Appellants,

v.

JEFFREY MAY, individually, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICUS CURIAE* NEW JERSEY EDUCATION ASSOCIATION IN SUPPORT OF APPELLEES

Interest of Amicus Curiae

The New Jersey Education Association ("NJEA") is the primary professional organization in the State of New Jersey for certified teachers and other instructional personnel, with a membership far exceeding 100,000. In its role as an economic organization, it is the parent organization for the vast majority of local collective bargaining units in New Jersey. Simply stated, the NJEA is the predominant professional and economic representative of the teachers in New Jersey, and its goal and purpose is to serve their professional and economic interests.

As part of this purpose, and throughout its history, the NJEA has involved itself in legal matters and judicial proceedings, both by funding local association actions and by direct participation. In numerous cases the NJEA has presented to the judiciary its position on various legal issues of import or concern to teachers and the educational community. Oftentimes this involvement has been in the form of appearing as an *amicus curiae*. Indeed, in the instant case the NJEA was an *amicus* before both the district court and court of appeals. The NJEA wishes to continue in that status, and has submitted to the Clerk of the Court, simultaneously with the filing of this brief, letters of consent by the parties.

The concern of the NJEA in this case is self-evident from a reading of the statute at issue. As will be explicated more fully below, the statute involved mandates "teachers" to allow students to observe a minute of silence for private contemplation or introspection. N.J. Stat. Ann. §18A:36-4 (West Supp. 1986). The decisions below explain in some detail the direct and primary role to be played by teachers in carrying out the requirements of the statute, should it be upheld by this Court. Obviously, as the group charged by the Legislature with enforcing the statute, the teachers have a substantial interest in the constitutionality of the statute.

For these reasons the NJEA respectfully submits this brief as an *amicus curiae* in this case. This brief is submitted in support of the position of the appellees and in favor of the decisions below holding the statute to be unconstitutional.

Statement of the Case

A. Facts

On December 16, 1982, a Moment of Silence ("MOS") bill was enacted in New Jersey. The enactment was perfected through an override of Governor Kean's veto. (JA. 388, 391). This statute is the latest in a long series of bills introduced or enacted by the Legislature but vetoed by three successive governors of both parties (JA. 381, 394-99).

The December 16, 1982 enactment of the MOS was preceded by extensive debate in both houses of the New Jersey Legislature. It attracted extensive media coverage in New Jersey and in the neighboring states of New York and Pennsylvania (App. Vol. V).[1] All of the debates and all of the newspaper coverage of the MOS centered on the legislators' pronouncements that they wished to encourage prayer in public school. In addition, a number of articles focused on responses to the bill issued by the Governor, teachers, school administrators, students and the public. These articles focused almost exclusively on the religious motivations for the bill's enactment, and differed only in either opposing or favoring that motivation (PE 21-36).

After the bill's enactment, the New Jersey Department of Education distributed the MOS to the various school

---

[1] Because of size, the extensive newspaper coverage of the MOS that was introduced at trial could not be reproduced. It is found in the Appendix filed with the Court of Appeals at Volume V. For easier reference, specific articles referred to in this appendix will be denoted by reference to the Exhibit number given to them at trial, *e.g.*, "PE 1".

districts without issuing any regulations or guidelines for its implementation (JA. 22-23). Some school districts, including the Edison School District, implemented the MOS immediately, and students, parents, and one teacher initiated the instant suit, challenging the constitutionality of the legislation.

B. Procedural History

On January 10, 1983, plaintiffs brought suit against the Commissioner of the Department of Education, the New Jersey Department of Education, the Edison Township Board of Education, and the Old Bridge Township Board of Education under the provisions of 42 U.S.C. §1983 and §§2201 and 2202 for declaratory and injunctive relief. Appellees contended that the MOS violates the Establishment Clause of the First Amendment and the Due Process provision of the Fourteenth Amendment in the Constitution of the United States, and provisions of the New Jersey Constitution.

The United States District Court issued a Temporary Restraining Order based upon appellees' showing of the Legislature's religious motivation for the enactment of the MOS (JA. 50). This Order concluded that, while the MOS was neutral on its face, the improper legislative purpose in passing the bill supported the issuance of restraint.

On January 18, 1983, the district court, with the consent of the appellees, allowed the intervention of: Alan J. Karcher, Speaker of the General Assembly; Carmen Orrechio, President of the New Jersey Senate; the New Jersey General Assembly and the New Jersey Senate

(JA. 53).[2] Thereafter, a hearing on the merits was scheduled.

During discovery, appellees attempted to discover from the legislators/intervenors the motivation behind the enactment of the MOS. Since there was no transcription or other official record of legislative debates, appellees attempted to verify whether written and eyewitness accounts of these debates were accurate. They also attempted to have the legislators express their motives for enacting the bill and disclose documents relied on or reviewed in considering the current law and its predecessors.

In response to this effort to ascertain the legislative motivation behind the MOS, the appellants moved for an order suppressing discovery (JA. 58). The district court decided that it would be inappropriate to require legislators to testify concerning their legislative activity, even when the legislative purpose is directly in issue. The trial court did, however, permit introduction of a comprehensive set of newspaper articles, editorials, and citizens' letters concerning the MOS' passage and implementation. Contrary to appellants' assertions, these articles constitute a comprehensive compilation of articles from numerous sources providing an extensive review of the entire legislative process and the public's perception of and reaction to it (JA. 120).

---

[2] Both the Senate and General Assembly have decided not to press this appeal. Mssrs. Karcher and Orrechio contend that, as representatives of a legislative body that no longer exists, they have standing to pursue this matter. This brief does not address that issue, but the NJEA supports the arguments of appellees that Karcher and Orrechio lack standing.

C. The District Court's Decision

At the trial on the merits, the appellees produced evidence of: prior bills introduced by many of the same legislators who sponsored the MOS; the newspaper articles, editorials and citizens letters; affidavits of appellees; opposition positions of education associations (JA. 284-300; 375-380; 403); parent and student reaction to the statute (JA. 23-46; 227-260); opinions on the law's lack of educational utility (JA. 38-41; 188-226; 238-39; 301-312); and descriptions as to how the MOS had been implemented in the classroom (JA. 24-27).

The appellants produced no evidence of their own concerning any purported secular purpose for the MOS. Instead, they introduced evidence as to how there might be a useful secular purpose for a moment of silence in the abstract (JA. 313-326; 352-360). They also introduced evidence relating to how the MOS was implemented in Sayreville, New Jersey (JA. 327-332; 333-350) and one expert's testimony on the difficulty of accurately assessing public opinion from newspapers (JA. 361-366).

The district court concluded that the MOS was unconstitutional. On October 24, 1983 the district court granted appellees' request for a permanent injunction. 572 F. Supp. 1561 (D.N.J. 1983) (JSA. 62a-100a). The district court specifically found that the Legislature had no *bona fide* secular purpose in enacting the MOS (JSA 94a). Further, the court found that the MOS both advanced and inhibited religion in contravention of the First Amendment. The district court's decision was appealed by appellants to the Court of Appeals for the Third Circuit.

D. The Court of Appeals' Decision

A divided panel of the Third Circuit affirmed the decision of the district court. 780 F. 2d 240 (3d Cir. 1985). The circuit court rejected the district court's findings under the "effect" and "entanglement" prongs of the *Lemon* v. *Kurtzman* test, but upheld the trial court's decision regarding the Legislature's improper religious motivation. 780 F. 2d at 247-53. The circuit court reviewed all of the evidence submitted to the district court and concluded that there was ample evidence to support the district court's findings of fact with respect to the legislative purpose behind the MOS.

Judge Becker, in dissent, employed a novel test which granted an extraordinary presumption of legitimacy to the MOS, and after disallowing much of appellees' evidence, held that the appellees did not meet their burden in overcoming this "presumption". 780 F. 2d at 256-66. Further, the dissent objected to the standard of review used by the majority in reviewing the trial court's findings of fact. *Id.*

The appellants then appealed to this Court. This Court has ruled that it will hear argument concerning appellants' standing at the same time it hears arguments on the merits.

Summary of Argument

This case centers on the constitutionality of New Jersey's Moments of Silence statute. This statute must be judged under the three pronged test of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), wherein the Court interpreted the Establishment Clause to require: a sincerely held secular legislative purpose for a statute's enactment; a primary effect that does not advance or inhibit religion; and an avoidance of excessive entanglement with religion. *Id.* at 612-13.

The district court held, and *amicus* contends, that there was no *bona fide* or sincere secular legislative purpose for the enactment of this statute and that the genuine and primary purpose of the statute was religious. Contrary to appellants' assertions, (Appellants' Brief at 11-12), this is not a "straightforward moment of silence" law. This Court requires a sincere secular motive for the enactment of any legislation which implicates religion. The evidence in this case shows that there was no genuine or real secular motive. This legislation was simply a transparent effort to circumvent this Court's prior rulings proscribing prayer in public schools.

Amicus also contends that this statute impermissibly advances and inhibits religion. The message clearly received by the public when the legislature enacted this measure was an endorsement of religious worship in schools. This is an impermissible effect. *Wallace* v. *Jaffree*, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring). Further, the implementation of the statute has the effect of furthering some religious activity and inhibiting other. The statute therefore does not pass the "effect" test of *Lemon*.

Finally, while the Court of Appeals correctly reviewed all of the evidence before deferring to any findings of fact of the lower court, the standard of review used will not effect the outcome of this case. Under any test the evidence is overwhelming. This statute was passed for an impermisssible religious purpose and has the effect of both advancing and inhibiting religion. The Court should therefore affirm the decision below.

ARGUMENT

POINT I

The MOS is an unconstitutional abridgement of the Establishment Clause because the purported "secular legislative purpose" is no more than a sham and the true purpose is entirely religious.

In 1962 and 1963 this Court sruck down as violative of the Establishment Clause state authorized prayer and Bible reading conducted as a brief exercise at the commencement of the public school day.[3] *Abington School District* v. *Schemp,* 374 U.S. 203 (1963); *Engle* v. *Vitale,* 370 U.S. 421 (1962). At the time there existed no state statutes calling for a moment of silence, whether for prayer or contemplation. Note, *The Unconstitutionality of State Statutes Authorizing Moments of Silence In The Public Schools,* 96 Harv. L. Rev. 1874, 1880 (1983) (hereinafter, "*Moments of Silence*"). Yet within several years

---

[3] The text of the Establishment Clause reads: "Congress shall make no law respecting an establishment of religion, . . ." It has long been held applicable to the states. *Everson* v. *Board of Education,* 330 U.S. 1 (1947).

a plethora of "moment of silence" statutes were enacted. In New Jersey, enactment was delayed by governors with greater sensitivity to and regard for constitutional concerns. But finally, after fifteen attempts, and in override of yet another gubernatorial veto, the New Jersey Legislature passed a MOS statute requiring teachers to allow students a moment of silence at the beginning of school for contemplation or introspection. N.J. Stat. Ann. §18A:36-4. The legislative history of the MOS, combined with the manifest intent of the legislators who enacted this bill, clearly shows that its primary purpose is religious, and that the asserted secular reason is a sham, proferred solely to distract judicial reviewers. For these reasons, and in view of the improper burdens placed upon teachers as the enforcers of the state-sponsored silence, the *amicus curiae* NJEA requests this Court to affirm the decision below invalidating this law.

This Court has enunciated a tripartite test for evaluating whether a challenged statute is circumscribed by the Establishment Clause. *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971). That test, which was recently reaffirmed in *Wallace* v. *Jafree,* 472 U.S. 38 (1985) provides that, to be constitutionally acceptable:

> First, the statute must have a secular purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion [citations omitted]; finally, the statute must not foster "an excessive government entanglement with religion". [citations omitted] *Lemon,* 403 U.S. at 613.

Each prong of the *Lemon* test must be met for a statute to be constitutionally acceptable. Failure to meet any one

of the three criteria is sufficient grounds for concluding that the statute is unconstitutional. *Wallace,* 472 U.S. at 68 (O'Connor, J., concurring); *Stone* v. *Graham,* 449 U.S. 39, 40-41 (1980). The MOS is violative of at least two of the three criteria enunciated in *Lemon.* Therefore, both courts below were clearly correct in permanently enjoining the enforcement of the statute.

The first prong of the *Lemon* test requires that the actual legislative purpose for the enactment of a statute must be clearly secular in nature. *Lemon,* 403 U.S. at 613; *Wallace,* 472 U.S. at 56-57. The mere assertion of a purported secular purpose is not enough for a legislature to meet the purpose inquiry, for the Court must determine if the purpose proffered by the legislature is a sham: a law will not pass constitutional muster if the secular purpose articulated by the legislature is not genuine or is merely a sham. *Wallace,* 472 U.S. at 64 (Powell, J., concurring). See also *Stone* v. *Graham,* 449 U.S. at 41 (rejecting as "self-serving" an assertion of a secular purpose); *Epperson* v. *Arkansas,* 383 U.S. 95 (1968).

Of course, it is the judicial branch of government that is charged with determining the constitutionality of statutes, *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137 (1803), and it is the judicial branch of government, and ultimately this Court, that must examine the record and determine if the purported legislative purpose is in fact a sham. *Wallace,* 472 U.S. at 75 ("I have little doubt that our courts are capable of distinguishing a sham secular purpose from a sincere one". (O'Connor, J., concurring)).

The federal courts, therefore, must look past the facade presented by a legislature and canvas the available indicia

of intent.[4] This Court has used the historical setting preceding the enactment of legislation, legislative debates, accounts of the intent of the legislature and public reaction to legislation as indicia of the true intent of a legislature when it enacted a challenged statute. An examination of each of these indicia can only lead to one conclusion—the legislative purpose behind the enactment of the MOS was the reintroduction of prayer and religious worship into public schools, a purpose proscribed by the First Amendment. *Schempp,* 374 U.S. at 222-23.

The historic backdrop to the enactment of a statute can provide a reference and understanding of the setting for a statute. *Moments of Silence,* 96 Harv. L. Rev. at 1879-80. The Court has used this setting in examining a statute's words and in reviewing legislative history to develop a thorough understanding of the legislaive intent. For example, in *Marsh* v. *Chambers,* 463 U.S. 783, 790 (1983) the Court reviewed the circumstances surrounding the enactment of the First Amendment in deciding the intent of Congress composed of some of the same members.

---

[4] The Appellants, relying on *United States* v. *O'Brien,* 391 U.S. 367 (1968) would have the Court look no further then the face of the statute. This reliance is clearly mistaken. *O'Brien* involved the regulation of the selective service system and its impact on freedom of speech. This case involves the proscriptions of the Establishment Clause, which this court has consistently held to require proof of a secular motive. *Lemon, Epperson, Wallace, supra.* Limiting the inquiry to whether the legislature's attorneys could conjure up and advance a secular purpose when a statute is challenged would simply be an abdication of this Court's responsibility regarding the enforcement of the Constitution. This Court has not hesitated to look behind a purported secular legislative purpose in deciding whether a statute is in conflict with the Establishment Clause. *Stone,* 449 U.S. at 41.

In *Epperson,* 393 U.S. at 108 n. 17, the Court inferred the religious intent behind a statute outlawing the teaching of evolution from, *inter alia,* its proximity to the Scope's Monkey Trial. Similarly, in *Wallace* the Court viewed a statute in the context of prior statutes passed by the state legislature in prior years. *Wallace,* 472 U.S. at 58. The historic setting for the MOS was reviewed thoroughly by the district court and it reveals the true religious purpose of MOS.

The record of the introduction and attempted enactment of bills similar to the MOS is telling. The MOS is simply the latest in a long series of legislative attempts to circumvent or evade the Supreme Court's pronouncements regarding prayer in public schools. Between 1970 and 1980, no fewer than fifteen bills were introduced regarding prayer and/or silent meditation in public schools. These bills ranged from proposals to allow "silent meditation" in schools (Bills S-3024, S-51, A-72 and A-276) to proposals allowing silent prayer or meditation (Bills A-597, A-133, A-373) to attempts to permit vocal prayer (Bills S-1296, A-1028), to a resolution to amend the First Amendment regarding prayer in public schools (Bill A-2997). A number of these bills were passed by the Legislature, but were vetoed by governors who recognized the improper motives of the Legislature (JA. 381, 394-99).[5]

Faced with this history, the appellants introduced *no* evidence purporting to show that the motivation behind *any* of the prior bills was anything but the advancement of religion. This historic context for the MOS points only

---

[5] The existing MOS was vetoed because Governor Kean recognized that the motivation behind its enactment was the reintroduction of prayer in public schools. J.A. 381.

to a prohibited religious motivation for the enactment of this MOS.

The legislative debates surrounding the enactment of the MOS corroborate its religious genesis. This legislative debate is patently relevant. This Court has consistently reviewed the debates and proceedings surrounding the enactment of a statute when attempting to assess the true intent of the lawmakers.[6] Unfortunately, the State of New Jersey does not transcribe its legislative debates, so the district court properly canvassed all other available evidence of the legislative history in furthering its proper and traditional inquiry into the legislative motive for the MOS.[7] In so doing, the district court was following a

---

[6] Appellants would prohibit a canvassing of the legislative views as either an improper intrusion into the domain of the legislature or as an examination of subjective views of individual legislators. Both of these arguments must fail. As already noted (supra, n. 2), when the issue in a case is whether the legislative purpose is compatible with the Establishment Clause, the Court has never refused to look behind a purported secular purpose advanced in support of a statute. The second argument is slightly more sophisticated, but still must be rejected. Short of canvassing the views of each and every legislator, the only method the Court can use in determining legislative intent is the debates and statements of the legislators sponsoring and supporting a bill. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 434-36 (1970); *Epperson* v. *Arkansas*, 383 U.S. 95, n. 16 (1968). Appellants' contention that the use of this evidence is not probative of the legislative purpose is simply not supported by the long history of this Court's reliance upon legislative debates in culling the intent of a legislative body.

[7] Appellants, citing "the Best Evidence Rule," Rule Fed. R. Evid. 803 (24), contend that the trial court erred in admitting numerous newspaper articles into evidence. This argument is, at best ingenuous.

(Footnote continued on following page)

long line of Supreme Court cases in which the Court has looked to testimony and accounts of legislative deliberations when a transcript of those deliberations is not available.

For example, in *Epperson*, 393 U.S. at 108 n. 16, the Court not only looked to newspaper advertisements utilized by the bill's proponents, but also considered letters to editors written by members of the public probative of legislative intent.

Thus the district court's review of memoranda, eyewitness accounts and newspaper articles concerning the legislative debates was neither novel nor unwarranted. It was properly assessing the only available record of the legislative history so that it could properly make an independent determination concerning the collective legislative motive for the enactment of MOS. Any other course would have been an abdication of the court's responsibility to properly apply the purpose prong of the *Lemon* test.

(Footnote continued from preceding page)

The best evidence of what transpired during the legislative debates is, of course, the testimony of the legislators themselves. They, however, refused to testify, claiming legislative privilege. Now, having prevailed on their claim of legislative privilege, appellants would exclude the written accounts of those debates as reported in newspapers. In this way, the legislators, who seek to assert a putative, if *post hoc*, "secular" purpose, hope to exclude all evidence of their true purpose. This would effectively prevent the Court from fulfilling its proper judicial review of the issues in this case. The Court has previously looked to newspaper advertisements, editorials and letters to newspapers in determining the true legislative purpose of suspect legislation. *Epperson*, 393 U.S. at 108 n. 16. There simply is no reason for the Court to refrain from similarly reviewing the newspaper articles, editorials and letters in this case.

Once the district court examined the evidence concerning the legislative history of the MOS, the outcome was obvious. The paramount purpose for the introduction and enactment of the MOS was the reintroduction of prayer into the New Jersey schools. The evidence presented—the eyewitness accounts, the newspaper articles and the statement of the bill's prime sponsor—leaves no doubt but that this bill was religiously motivated and that the Legislature had no true secular purpose for its enactment.

The most comprehensive reports on these debates are contained in the dozens of newspaper accounts of the legislative sessions. Contrary to appellants' assertions, those acounts are not isolated or fragmentary reports, but are an exhaustive compilation of articles from numerous papers covering all of the legislative debate and the public's reactions to them. Individually, each and every article and editorial recognizes the entirely religious motives of the bill's sponsors and supporters. Cumulatively, the evidence is overwhelming. The legislative purpose for MOS is the circumvention of the Supreme Court's prior pronouncements concerning the Establishment of Religion Clause.

The bill's supporters in the state Senate had this to say on its behalf: "Maybe in the future they [the Supreme Court] will say prayer is one thing and separation of church and state is another". (Senator Pollack, Quoted in Trenton Times, PE 13). This bill would bring "prayers back into school through the front door". (Senator Orrechio, Asbury Park Press, PE 9). The founding fathers are "spinning in their graves" at seeing how the Establishment Clause has been "twisted". (Senator Kennedy, Asbury Park Press, PE 9).

The debate in the Assembly also centered exclusively on how this bill could be used as a vehicle for reintroducing prayer in public schools. Senator Adubato opined: "Prayer never hurt anyone". (Courier—Post, PE 5), and "When I vote for this override, I'll be saying 'Thank You' to the parochial schools and 'Thank You' to God". (Trenton Times PE 3). "I would like to see prayer in school and I admit it." (Star Ledger, PE 2). Similarly, Assemblyman Wolf stated: "It's a prayer". (Star Ledger, PE 2).

Perhaps the most telling evidence of the legislative purpose comes from the bill's prime sponsor, Assemblyman Zangari, who had sponsored numerous other predecessor bills providing for prayer in schools. Those that were passed were vetoed. This time around, he specifically tailored the bill to circumvent this Court's rulings on the subject. In committee hearings Mr. Zangari noted that he deleted all reference to prayer and had reduced the bill to 54 words. (JA. 405). This attempt to undermine the constitutional pronouncements of this Court is apparent in Mr. Zangari's speeches. In his presentation of the bill in Committee, while paying lip-service to a purported secular purpose, he was concerned primarily with prayer. (JA. 225-27, 229-30; 405). His debate before the Assembly is equally telling. Referring to the prayer held to open the legislative sessions, he stated: "If it's good for all the grown-ups, why shouldn't it be good for my grandchildren?" (Zangari, Philadelphia Enquirer, PE 8).

The legislative history is clear. Apart from one attempt to mask the bill's purpose with a secular aūra, there was only one truly acknowledged legislative purpose for the enactment of MOS: the reintroduction of prayer in public schools. The purported secular purpose advanced by the

legislature, a "transition" into the school day, is belied by the lawmakers own statements in the debates surrounding the passage of this act. It is also belied by the fact that teachers simply do not need a state-sponsored minute of silence in order to achieve any pedagogical purpose; teachers already possess the power to impose one minute or thirty minutes of silence in any classroom.

The historical background preceding the debates points toward the wholly religious motivation behind the MOS. The legislative debates confirm this. Finally, an examination of the public's perception of the Legislature's purpose in enacting MOS reveals that everyone—all newspapers, all correspondents, all of the members of the general public who followed these debates— knew that the purported secular purpose was nothing more than a sham.[8] Every single letter to the newspapers, whether pro or con, recognized the true, and truly religious, legislative purpose. Every editorial and commentary knew the actual motive behind this enactment. Without exception, each of the dozens of comments characterized the MOS as a transparent attempt to circumvent the Constitution and reinstate prayer in public schools.

Both the district court and Third Circuit recognized the religious motivation behind the MOS. Both courts specifically found that the purported secular purpose advanced by the legislature in support of the MOS was, and is, a sham. 780 F. 2d at 251-52; 572 F. Supp. at 1571. These determinations, under any standard of review, are

---

[8] In *Epperson*, the Supreme Court looked at the "many letters to newspapers by members of the public indicative of the public perception that the bill's primary purpose was religious . . ." 393 U.S. at 108 n. 16.

clearly correct, for the evidence is compelling. The historic background shows that the MOS was simply the latest in a series of measures designed to get prayer back in schools. The legislative history documents the religious motivation of the collective legislative body. Finally, the public perception confirms that all responsible observers recognized the wholly religious nature of the legislative intent in enacting MOS. Since the MOS was enacted with a prohibited legislative religious purpose, it must be struck down as unconstitutional. *Wallace,* 472 U.S. at 56.

POINT II

The MOS unconstitutionally abridges the Establishment Clause because it has a primary effect of both advancing and inhibiting religion.

The second prong of the *Lemon* test requires the Court to determine if the challenged statute has "a primary effect that neither advances nor inhibits religion." *Committee For Public Education* v. *Nyquist,* 413 U.S. 756, 773 (1973). "The relevant issue is whether an objective observer, acquainted with the text, legislative history and implementation of the statue, would perceive it as a state endorement of prayer in public schools. *Wallace,* 472 U.S. at 69 (O'Connor, J., concurring). See also *Epperson,* 393 U.S. at 106-07. The district court found, and the evidence clearly shows, that the predominant effect of the MOS is the advancement and inhibition of religion and religious beliefs. Therefore, this Court should find that it is impermissible under our Constitution.

To be sure, the Third Circuit found the MOS to be a legitimate time, place and manner restriction on religious observance. 780 F. 2d at 249. Putting aside for a moment the lack of any need for a state law in order for a teacher to impose a moment of silence in a classroom, it may be that, in the abstract, a moment of silence in school is a defensible time, place and manner restriction. But here there was no abstract statute. Rather, it was a statute imbeded in a concrete history of religious motivation and fully recognized as religious in purpose by the populace. There was a clear and effective message conveyed to the general public and to school children. This moment of silence was meant to advance Christian religious worship in schools. Further, this legislation would inhibit other religious practices. Accordingly, the Court of Appeals holding on this point should be reversed.

The district court did not base its finding that the MOS failed the effect prong of the *Lemon* test on the perceptions of observers. However, it is an important basis for invalidating the statute. See *Epperson*, 393 U.S. at 108. See also *Wallace*, 472 U.S. at 69 (O'Connor, J., concurring). As fully explicated in Point I, the whole purpose for enacting the MOS was to reestablish religious worship in the classroom. The New Jersey Legislature wanted to send a message to the students and populace of New Jersey: We support and encourage prayer in school. This message, which was evident in the legislative debates, in the historical setting for the debates, and in the language of the bill itself, was received by the students and the New Jersey general public. It was received loud and clear. Dozens of editorials were written on the MOS, *all* of which centered on the encouragment of prayer in classrooms. Dozens of

letters to newspapers were documented. All of these concerned prayer in the classroom. Students teachers and administrators who were interviewed by reporters knew of the legislative purpose. (See PE 31, 32, 33).

There is simply no contesting that any person who was aware of the statute was aware that New Jersey had passed a law with the express purpose of encouraging religion. This is a prohibited effect. *Wallace,* 472 U.S. at 69 (O'Connor, J., concurring); *Epperson,* 393 U.S. at 107-08.

The MOS has a prohibitive religious effect for another reason. Credible testimony at trial indicated that the MOS, at least as implemented in some school districts, required coerced group activity in which various outward manifestations of prayer were exhibited. Students were told to remain quiet, close their eyes, bow their heads or otherwise engage in conduct that closely resembles traditional Christian prayer (JA 329-31). This, coupled with the clear religious message sent by the Legislature, inescapably leads to the conclusion that the statute advanced the practice of religion in schools.

This conclusion is particularly compelling in light of the fact that the practice is required of malleable and impressionable school children. This Court has consistently recognized that students are extremely vulnerable to pressures from both their teachers and their peers. *Tilton* v. *Richardson,* 403 U.S. 672 (1971). The exercise involved in the moment of silence is closely akin to that which many students experience at home when they are trained by their parents to pray before going to bed or in Church when silent prayer is conducted. This connection is compounded when the teachers instruct the students to bow their heads or shut their eyes or partake in some other

practice closely associated with religious worship. *McCollum* v. *Board of Education*, 33 U.S. 203 (1948). Plainly the MOS clearly advances religious worship in the classroom.

The MOS also inhibits some in the practice of their religious beliefs. A number of witnesses indicated that coerced prayer, or its outward manifestations, effectively nullifies and drains traditional religious services of vitality. Many people view mandated group activity, in which prayer is a dominant purpose, as emasculating such a process of all meaning.

Similarly, the testimony adduced at trial indicates that the MOS inhibits modes of prayer of various religious groups. Even if it were legitimately designed to provide students with an oportunity to pray, at least some students could not do so because the statute does not permit the physical behavior required by their religious beliefs. The Moslem, who must kneel and cry aloud to Allah, would not be able to participate in the religious observance and, indeed would feel ostracized because of his religious differences. Finally, the MOS would violate the beliefs of those individuals who profess no acknowledgment of a deity, but who have heard the Legislature's clear message and are forced to sit quietly and participate in conduct which certainly mirrors the traditional posture of prayer.

The effect of the MOS is to both advance and inhibit religion. All observers of the legislative debates recognized and responded to the uniquely religious message contained in the MOS. It has been implemented in such a way as to both advance and inhibit religion. Accordingly, the district court was correct in finding that the MOS violated the Establishment Clause.

CONCLUSION

In light of the foregoing, it is manifestly apparent that the Monment of Silence Statute enacted in New Jersey in 1982 was religiously motivated, lacked any sincere or *bona fide* secular purpose, and had the effect of advancing and inhibiting religion. For these reasons it is clear that the statute contravenes the Establishment Clause of the First Amendment of the Constitution. Accordingly, the decisions below, finding the statute unconstitional, should be affirmed.

Respectfully Submitted,

JAMES R. ZAZZALI
Counsel of Record

KENNETH I. NOWAK
CHRISTOPHER L. LEAVEY
ZAZZALI, ZAZZALI & KROLL
Attorneys for New Jersey Education Association